



In the Matter of:

TIM SMITH,

COMPLAINANT,

v.

WESTERN SALES & TESTING,

RESPONDENT.

ARB CASE NO. 02-080

ALJ CASE NO. 01-CAA-17

DATE: March 31, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Tim Smith, *pro se*, Amarillo, Texas

For the Respondent:

James A. Prozzi, Esq., Pittsburgh, Pennsylvania

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995) (CAA). The Complainant, Tim Smith, alleges that Respondent, Western Sales & Testing (WST), violated the CAA when it retaliated against him for lodging complaints with the Texas Natural Resource Conservation Committee (TNRCC) and the United States Department of Labor's Occupational Safety and Health Administration (OSHA). On May 15, 2002, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending that Smith's complaint be dismissed. For the following reasons, the R. D. & O. is reversed in part and affirmed in part.

BACKGROUND

WST is a re-test facility for compressed gas transport containers. It reconditions vehicle chassis and re-certifies cylinder tube trailers. Its facilities consist of an office, a main fabrication shop, a paint shop and a separate grit blast shop. R. D. & O. at 4.

WST hired Smith on October 5, 1995. He worked as WST's quality control manager. His duties included running tests related to the cylinder cleaning process, checking trailers for leaks, organizing data packs for government customers, and making decals for cylinders identifying the company trailer and the cylinder product. R. D. & O. at 4. His direct supervisor was Steve Aderholt, WST's Vice President of Sales and Production.

On or about April 24, 2001, Smith informed Aderholt that painting was being conducted with the paint shop doors open. Aderholt went to the paint shop, closed the open door, and told the painters to keep the paint doors shut. Transcript (Tr.) 96, 239. Smith testified that he informed Aderholt that paint overspray was damaging his automobile, which was parked near the paint shop doors. Tr. 125. Aderholt testified that Smith did not, at the time, report any damage to his vehicle. Tr. 96.

On April 25, Smith contacted TNRCC, informing them that "[p]ainting . . . is being done with the door open and overspray is drifting onto personal vehicles." Complainant's Exhibit (CX) 5, p. 15. Smith informed Darrell Gaddy, WST's Environmental Specialist, that he had contacted TNRCC. Tr. 127-128.

Smith testified that he contacted OSHA on May 1, 2001. Tr. 139. He complained that WST's painting operations were exposing him and his co-workers to paint fumes. He also complained about dust, open flames on gas heaters, and the lack of respirators. Tr. 140-141. Smith contends that WST was aware of these complaints.¹

On May 1, 2001, TNRCC conducted an inspection at WST but no painting was being performed in the paint shop. On May 2, 2001, Smith again contacted TNRCC to complain about the painting operations. TNRCC returned to WST later that day and conducted an inspection. That same day Bill Piehl, President of WST, approached Smith in WST's parking lot. Piehl asked Smith "what the hell are you trying to do Mr. Tim?" and Smith replied, "what the hell does it look like?" R. D. & O. at 5, 10, Tr. 135. Piehl stated, "it looks like you're trying to shut us down" and opined that contacting TNRCC was "a chicken shit way" for Smith to deal with his concerns. Tr. 36, 136. Piehl testified that at the time he was aware that Smith had complained to OSHA earlier that year. Tr. 43.

On May 3, 2001, Piehl called Smith into his office and told him that he was sending Smith home for a "cooling off" period. Tr. 52-53, R. D. & O. at 9. According to

¹ On November 5, 2001, OSHA issued a letter describing its findings during the inspections initiated by Smith's safety complaint of May 1, 2001. The letter mentions that although WST exposed loading area employees to paint fumes, "[c]ylinder painting is done at night and the area is ventilated afterward. No citation will be issued as a result of this complaint item." CX-1.

Piehl, he and Aderholt had already discussed Smith's attitude. Piehl testified that he told Smith:

I thought that you ought to go home and have a cooling-off period, so to speak, because of – I was upset because this – your attitude and stuff had been going on at least since December, and so I thought it was best that you go home and think about it, come back and make a good, loyal employee and say I'm ready to get on with it.

Tr. 53. Piehl did not give Smith a date to return to work after being sent home. WST continued to pay Smith his full salary during the entire "cooling off" period. Piehl testified that he intended to recall Smith after three months. WST did not hire anyone to replace Smith during the "cooling off" period. Smith's desk was cleaned out after he left the premises. Tr. 40, 72-73, 103-104.

As a result of the inspection that took place on May 2, TNRCC issued a letter dated May 21, 2001, indicating that "spray painting was being conducted at the spray booth at this facility with the booth's door left open" and that "[a] Notice of Enforcement has been issued to [WST] for failure to comply with the requirements of [30 T.A.C. § 106.433] regarding surface coating operations." CX 5, p. 15.²

Piehl testified that although WST may have allowed atmospheric emissions, he was unaware that TNRCC had officially cited it for any violations on May 2, 2001. Tr. 36-37. Aderholt acknowledged that WST was cited on May 2, 2001, for filters that were not in place during the inspection. Tr. 114.

In late July 2001 Smith contacted Piehl in an effort to return to work. Tr. 58. A meeting between Smith and WST managers was scheduled for July 30, 2001, but that meeting was postponed for one day because Piehl met with Tom Nystel, an OSHA inspector, on WST's premises. Tr. 59-60. During this July 30, 2001 meeting, Piehl informed Nystel that Smith had been placed on a "cooling off" period because he had become argumentative. Tr. 86.

On July 31, 2001, Smith met with Piehl, Aderholt and Mark Griffin, WST's Vice-President. Tr. 145-146. Aderholt testified that the "cooling off" period lasted three months because he, Piehl and Griffin were unable to discuss Smith's return to work due to their schedules and travel commitments. R. D. & O. at 15. Aderholt also testified that, during the meeting, he told Smith about proposed changes to his duties, while Smith expressed his dissatisfaction with some of WST's operations. Tr. 241-44. Smith stated

² "Alleged Source: Paint Spray, Western Sales & Testing; Initial Problem: Painting conducting (sic) by Wester (sic) Sales & testing, 1401 East 46th, in Amarillo, is being done with the door open and overspray is drifting onto personal vehicles."

that he did not believe that Piehl and Aderholt wanted him to return to work and that he felt he had been blacklisted and subjected to discrimination. Tr. 244.

Smith testified that during the meeting, as result of his distrust of Piehl and Smith, he requested “something in writing” stating his rate of pay, job title, job description, and a statement that WST would not retaliate against him for calling TNRCC and OSHA. R. D. & O. at 8, 11, 16, Tr. 152. Smith stated he intended to give the written document to his lawyer for review. Tr. 153. Aderholt testified that Griffin asked Smith “[w]hat are you trying to say ? Are you coming back to work or not ?” Tr. 248. According to Aderholt, Smith responded by stating “I want all these things written down and I want a written guarantee before I’ll come back to work.” Tr. 248. None of the meeting attendees told Smith during the meeting that he would not receive the document he requested. Aderholt testified that WST does not provide any of its employees at any level, including management, with such written guarantees. Tr. 65.

Neither Piehl nor Aderholt testified that Smith specifically stated that he was quitting his employment with WST. Tr. 62, 104. However, according to Piehl, Smith contended that he would not return to work unless WST met his demand for a written contract and guarantees. Tr. 64-65. Piehl concluded that WST could not meet Smith’s demands but did not inform him of his conclusion at the meeting. Tr. 65.

On August 10, 2001, Smith received a letter dated August 6, 2001, from Piehl:

Dear Tim,

As you are aware, you have been on paid leave since May 2. We appreciate your coming in on July 31 to discuss your return to work.

After we reviewed the tasks you did before your leave of absence and went over the same tasks that you would be expected to perform upon your return, you expressed your displeasure in many aspects of employment at this company. You ended with the statement that you would only consider returning if we would send you an offer to return and that you would not come back without a written and signed contract. We said we would discuss your conditions and get back with you.

Western Sales and Testing has never had the policy of written contracts, nor does it intend to in the future. With regard to the other issues you brought up, we are disappointed that you feel your experience here has been unpleasant.

You have two weeks vacation time accrued and your check is enclosed, along with your check for the week ending August 3, 2001.

We regret that you have abandoned your interest in employment at Western Sales & Testing. We wish you success in the future.

Very Truly Yours,
WESTERN SALES & TESTING OF AMARILLO, INC.
Bill Piehl
President

CX-13. In response to the August 6, 2001 letter, Smith wrote to Piehl that he did not inform anyone at WST that he had quit or abandoned his job:

Dear Bill,

I am writing you this letter to inform you that in no way did I ever tell you, or anyone present in the meeting that we had on July 31, 2001, that I quit my job. I did request that you put in writing that I would not be retaliated against for calling Osha (sic), or TNRCC. However, this was only a request. I did not in any way give you an ultimatum of any kind. I told you that I wanted an attorney to review the letter from you. I also stated several times that I was not quitting when I read you a list of things that I would like to see changed at W.S.T. Apparently you misunderstood my request. You also told me that you would let your attorney review the letter you were sending and that you would be in touch. I am still waiting for confirmation from W.S.T. of the date you want me to return to work. Again, I did not in any way abandon my position at my place of employment.

Very truly yours,
Tim Smith

CX-28. WST received this letter on August 11, 2001.

CASE HISTORY

On or about August 10, 2001, Smith filed a complaint against WST with OSHA complaining of various violations of the CAA, including WST's alleged termination of his employment. ALJ Exhibit (ALJX) 1. The Complaint begins:

Mr. Foster,

On April 25, 2001 I called the Texas Natural Resource Conservation Commission. The reason I called was because Western Sales & Testing, my place of employment, was painting trailers and compressed gas tubes with the doors open. As a result of this, I as well as my co-workers was (sic) being forced to breathe paint fumes and my personal vehicle was being subjected to overspray. I called TNRCC only after I had informed the Vice President of the company, Steve Aderholt. ... On May 1, 2001 TNRCC came to WST. After TNRCC inspected the paint shop and had left the premises, about two hours later, WST began painting again in the paint shop with the doors open. The very next day May 2, 2001 WST was painting with the doors open again. I called TNRCC again and told them. TNRCC told me that they had to catch them in the act to do anything. I told TNRCC that if they wouldn't wait six days before they came to inspect that they could catch them in the act. Because I felt that TNRCC had already warned WST of them coming the first time, I felt compelled to take pictures of them in the act myself. While I was taking pictures, TNRCC showed up. I told Saiid, who was with TNRCC that I was glad they were there to catch them in the act. I also told Saiid that I felt they warned WST of their first inspection for many reasons. I won't go into those reasons at this time; however, I do have documented support for my suspicions. Saiid told me that they were here now and that WST was in violation for painting with the doors open

The complaint then recounts events related to the "cooling off" period and discussions leading up to the July 31 meeting. Smith concludes by contending that he did not quit during the meeting:

I brought up several things that I felt were wrong at WST. When I finished, I told them that I was not quitting and that I would like them to put in writing so that I could let an attorney review for me:

1. My job title.
2. My job description.
3. My rate of pay.
4. That I would not be retaliated any longer for calling OSHA and TNRCC.

When I finished Mark Griffin said, I don't understand, if it's not enough you will or you won't come back to work? Then I told Mark that I didn't say anything about enough that what I said is that I would like WST to put in writing the above mentioned things I had previously said. Then Bill Piehl said, ok and we'll let our attorney review them too. The meeting was over and I left.

Now I'm writing OSHA to let you know that I did not quit my job. I also sent a certified letter to WST telling them that I in no way abandoned my employment with them . . . How many people do you know would quit their job when all they had to do was walk to the mailbox every week to receive it.

The ALJ conducted a hearing on January 29, 2002.³ On May 15, 2002, the ALJ issued the R. D. & O., finding that Smith did not engage in activity protected by the CAA because his motivation for contacting TNRCC was "personal in nature" and "the substance of his voiced concerns was about paint overspray" on his vehicle. R. D. & O. at 26. The ALJ also found that WST subjected Smith to adverse action by placing him in a "cooling off" period because his "terms, conditions or privileges of employment" were altered by his exclusion from the job site. *Id.* Finally, the ALJ held that Smith did not

³ The ALJ states in his R. D. & O. that

Smith claims he was discharged because he refused to perform an illegal act of falsifying government documents on or about April 18, 2001. This allegation was treated in the Order Granting Partial Summary Decision as untimely raised since, if it occurred, the event pre-dated the thirty (30) day period prior to the filing of Complainant's complaint on August 10, 2001. Accordingly, it can not serve as an independent basis for his alleged unlawful discharge.

This is an erroneous statement of the law governing the timeliness of Smith's whistleblower complaint. Under the environmental statutes, the time for filing a complaint begins to run from the date of the adverse action, not the date the employee engaged in the protected activity. *Erickson v. U.S. Env'tl. Prot. Agency*, ARB No. 99-095, (July 31, 2001) (citing 29 C.F.R. § 24.3(b)). However, neither party has appealed the ALJ's ruling on this matter, and the ALJ's error does not affect the outcome of this case.

prove by a preponderance of the evidence that his employment with WST was terminated in retaliation for informing TNRCC of CAA violations at WST's paint shop. *Id.*⁴

STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the employee protection provisions of the CAA. *See* 29 C.F.R. § 24.8 (2001); *see also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the CAA. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

The Board is not bound by an ALJ's findings of fact and conclusions of law in a CAA case because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8, pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally* *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.*, 340 U.S. at 492-97; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1076-80 (9th Cir. 1977).

In weighing the testimony of witnesses, the ALJ as fact finder has had an opportunity to consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the

⁴ Smith has not appealed the ALJ's rulings on his blacklisting and intimidation claims. *See* R. D. & O. at 27; *see also* ALJ's January 24, 2002 Order Granting Partial Summary Decision.

witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988). The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)(court will uphold ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."").

DISCUSSION

A. Employee Protection Under the Clean Air Act

The CAA is a comprehensive scheme for reducing atmospheric air pollution. Its purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" as well as "to encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C.A. § 7401(b) (West 1995). See, e.g., *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), citing *Texas v. Env'tl. Prot. Agency*, 499 F.2d 289, 293 n.1 (5th Cir. 1974) (addressing the control of hydrocarbon emissions). Under the CAA, an "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C.A. § 7602(g) (West 1995). Regulations implementing the CAA define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e) (2003). See, e.g., *Kemp v. Volunteers of Am. of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000-CAA-6 (ARB Dec. 18, 2000).

The CAA includes an employee protection provision which provides that:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C.A. § 7622. Complaints about unsafe or unhealthful conditions communicated to management or to outside agencies are protected. *Scerbo v. Consolidated Edison Co. of N.Y., Inc.*, 89-CAA-2 (Sec’y Nov. 13, 1992), citing *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1513 (10th Cir. 1985); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). Additionally, the legislative history of the CAA indicates that “[r]etaliatory action by the employer would also be prohibited if it were in response to an employee’s exercise of rights under Federal, State, or local Clean Air Act legislation or regulations.” H.R. Rep. No. 294, 95th Cong., 2d Sess. 325-326, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1404-05.

To prevail on a complaint of unlawful discrimination under the CAA, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because he engaged in protected activity. *Carroll v. United States Dep’t of Labor*, 78 F.3d 352 (8th Cir.1996); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir.1980); *Tyndall v. United States Env’tl. Prot. Agency*, 1993-CAA-6, 1995-CAA-5 (ARB June 14, 1996). To meet this burden, a complainant may prove that the legitimate reasons proffered by the employer for its actions were not the true reasons, but rather were a pretext for discrimination (*St. Mary’s Honor Center*, 509 U.S. at 507-508), i.e., a complainant may prove that he suffered intentional discrimination by establishing that the employer’s proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. An adjudicator’s rejection of an employer’s proffered legitimate explanation for adverse action *permits* rather than *compels* a finding of intentional discrimination. Specifically, “[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” *Burdine*, 450 U.S. at 519. We proceed to a review of the evidence in this case in the light of the legal standards just enunciated

B. Smith Engaged in Protected Activity.⁵

The ALJ correctly states that the employee protection provision of the CAA is applicable only to environmental concerns. R. D. & O. at 21-22. When an individual makes a safety complaint that implicates an EPA regulation dealing with emissions into the ambient air, such a complaint is protected under the CAA. On the other hand, if the complaint identifies the release as an occupational hazard, the employee protection provision of the CAA is inapplicable. *See, e.g., Aurich v. Consolidated Edison Co. of N.Y., Inc.*, 86-CAA-2 (Sec’y Apr. 23, 1987) (emissions to outside air covered by CAA whistleblower provision; emissions as an occupational hazard not covered). Additionally, “an employee’s reasonable belief that his employer is violating the law is a sufficient basis for a retaliation claim if the employer takes action against the employee because he expressed this belief, irrespective of after-the-fact determinations regarding the correctness of the employee’s belief.” *Rivers v. Midas Muffler Ctr.*, 94-CAA-5, slip op. at 3 (Sec’y Aug. 4, 1995).

The ALJ held that Smith’s complaints about WST’s painting operations are not protected under the CAA. R. D. & O. at 22, 26. We disagree. For the following reasons we reverse the ALJ’s ruling that Smith did not engage in protected activity under the CAA.

Smith has admitted that his primary motivation for lodging complaints about WST’s painting operation was that paint overspray was damaging his vehicle. Tr. 139. However, when he went to the TNRCC he complained about paint overspray and paint fumes. He alleged that WST was violating the law by painting with the doors open. Smith’s complaints about paint overspray do not implicate the CAA because they constitute a concern about paint settling onto his car but not being released into the ambient air. However, Smith’s complaints about paint *fumes* are protected under the CAA.

Smith’s complaint references actions taken by TNRCC against WST. TNRCC cited WST’s surface coating operations for violating a state environmental regulation. That regulation provides, in pertinent part, that “[a]ll facilities covered by this section at a site shall implement good housekeeping procedures to minimize fugitive emissions.” 30 TEX. ADMIN. CODE § 106.433 (West 2003). Texas regulations define a fugitive emission as “any [volatile organic compound] entering the atmosphere which could not reasonably

⁵ This Board has noted that “[o]nce the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful. The [trier-of-fact] has before it all the evidence it needs to determine whether ‘the defendant intentionally discriminated against the plaintiff’” *See, e.g., Martin v. Akzo-Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-16 (ARB July 31, 2003). However, because we find that WST retaliated against Smith, we issue herein a specific ruling on Smith’s protected activity.

pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.” 30 TEX. ADMIN. CODE § 115.10 (West 2003). This language mimics the regulations implementing the CAA, which define fugitive emissions as “those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening. 40 C.F.R. § 70.2 (2003).

TNRCC’s conclusion that WST released “fugitive emissions” into the “atmosphere” in violation of Texas administrative regulations supports Smith’s contention that he engaged in protected activity. We note that, in his testimony, Smith explained that the open doors caused him to breathe in fumes when he was outside of the facility, as well as inside it. Tr. 124, 224. Piehl admitted that “somebody across the railroad tracks complained about the fumes.” Tr. 70. Smith also introduced evidence that prior TNRCC investigations had identified open doors as related to the release of paint fumes from the facility. CX 8. We conclude that Smith’s complaint to TNRCC about WST painting with the doors open was a complaint about paint fumes as air pollutants escaping into the ambient air and therefore was an action to carry out the purposes of the CAA.

The ALJ also held that Smith did not engage in protected activity because his motivation for contacting TNRCC and OSHA “was personal in nature in that the substance of his voiced concerns was about paint overspray on his ‘new’ vehicle.” R. D. & O. at 26. This is an incorrect interpretation of the requirements of the CAA. It is well established that there is no requirement that a whistleblower’s actions be motivated by a concern for the environment. *See, e.g., Oliver v. Hydro-Vac Services, Inc.*, 1991-SWD-1 (Sec’y Nov. 1, 1995). Where a complainant has a reasonable belief that the respondent is violating the environmental laws, other motives he or she may have had for engaging in protected activity are irrelevant. *See, e.g., Jones v. EG & G Def. Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998).

We also disagree with the ALJ’s conclusion that Smith was required to establish that WST released an amount of pollution adequate to trigger a violation of the CAA. R. D. & O. at 22, 26. There is no requirement that an employee establish such information to present a whistleblower claim. *See, e.g., Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec’y Jan. 25, 1994)(under Solid Waste Disposal Act)(fact that used oil and antifreeze were not listed under the Act was not dispositive of the case).

Finally, we note that pro se pleadings should be construed liberally. *See, e.g., Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001), citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Smith’s complaint can be reasonably construed as encompassing violations of the CAA. We therefore conclude that Smith engaged in protected activity when he complained about WST performing its painting operations with its garage doors open.

C. The “Cooling-Off” Suspension Was Retaliatory.

We agree with the ALJ’s holding that WST violated the CAA by sending him home for what WST contends was a “cooling off” period immediately following the May 2, 2001 inspection:

The record is clear that Respondent was aware of Complainant’s complaints to TNRCC as expressed by Mr. Piehl in the company parking lot where he exhibited animus or hostility toward Smith for having made such reports to an outside investigative agency rather than to Mr. Piehl. The timing of Smith’s “cooling off” period, the day following the investigation by TNRCC, is persuasive evidence that Respondent retaliated against Smith, in part, for reporting alleged violations. Such a conclusion is buttressed by Mr. Piehl’s testimony that Complainant had exhibited a “bad attitude” from the beginning of his employment, and his uncertainty that his “attitude” was inclusive of reporting complaints to TNRCC I find the imposed “cooling off” period constituted an adverse action against Smith, if his activity was protected under the CAA, since his “terms, conditions or privileges of employment” were arguably altered by his exclusion from his work duties and job site.

R. D. & O. at 26. *See, e.g., Scerbo v. Consolidated Edison Co. of N.Y., Inc.*, 89-CAA-2 (Sec’y Nov. 13, 1992)(causation shown where decision to transfer complainant closely followed his protected activity); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldrige*, 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985); *Burrus v. United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir.)(causal connection established by showing that employer was aware of protected activity and that adverse action followed closely thereafter).

Although the “cooling off” period was retaliatory, Smith was paid his regular salary during the entire period. Smith testified that it was “stressing him out” to be on leave, but did not present specific evidence as to damages for this violation, nor has Smith requested such damages in his appeal to the Board. Tr. 154.

D. Smith Did Not Prove that WST Terminated His Employment.

The testimony of Piehl, Aderholt, and Griffin, in conjunction with WST’s August 6, 2001 letter, is evidence that Smith demanded that terms of his employment be committed to writing and that he be provided a written non-retaliation guarantee as a condition for his return to work. In contrast, Smith’s testimony and his letter responding to WST’s letter is evidence that he requested the written terms, but not as a requirement for his return. The ALJ concluded, based upon “a synthesis of the most plausible

versions of the July 31, 2001 meeting,” that Smith conditioned his return to work upon the company’s meeting the demands he made at the July 31, 2001 meeting. R. D. & O. at 29 (“In effect, notwithstanding his denials otherwise, the demands, which were unacceptable to Respondent, were an ‘ultimatum’ without which he would not return to work.”). The ALJ was not persuaded by Smith’s contention that he did not request the written terms as a condition for his return.

The ALJ, unlike the ARB, observes witness demeanor in the course of a hearing, and the ARB defers to an ALJ’s credibility determinations that are based on such observation. *Trachman v. Orkin Exterminating Co., Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3 (ARB Apr. 25, 2003). *See also KP&L Elec. Contractors, Inc.*, ARB No. 99-039, ALJ Case No. 96-DBA-34, (ARB May 31, 2000), citing *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983) (contrasting exceptional weight accorded to ALJ credibility findings that rest on demeanor with lesser weight accorded to credibility findings based on other aspects of testimony, such as internal discrepancies or witness self-interest). We attribute significant weight to an ALJ’s demeanor-based credibility determinations because the Board does not have the opportunity to observe testifying witnesses. *See, e.g., Phillips v. Stanley Smith Sec., Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001), citing *Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1982).

In this case, we rely on the ALJ’s interpretation of the testimony regarding the July 31, 2001 meeting. This meeting took place only one day after an inspection at WST precipitated by one of Smith’s OSHA complaints. The temporal proximity between the inspection and the interpretation of Smith’s request for a written document could suggest a retaliatory motive. However, such speculation is outweighed by the testimony of Piehl and Aderholt, which the ALJ found credible. For example, Piehl testified that he interpreted Smith’s demand for a written guarantee as an ultimatum:

- Q. These demands that you say I made, you claim that they were demands, did I say that I would you [sic] to put in writing my job description, my rate of pay and that you would not retaliate against me ?
- A. Yes, sir.
- Q. And did I say that if you didn’t do that, then I quit ?
- A. No, you didn’t say you quit.
- Q. Yet, in a letter that you sent me dated August 6th, 2001, I actually received the letter on August 10th, the letter states that you regret that I abandoned my job.
- A. That’s correct.
- Q. Correct. Well, how did you come to the conclusion that I abandoned my job if I never told you that I quit, if I didn’t receive this written letter, the contract, as you put it ?

- A. You made it pretty plain [sic] that if you did not get that contract or guarantee that you would not come back.
- Q. How did I make it plain ?
- A. You said you wouldn't come back without that.
- Q. Well, you told me earlier that I said that I wouldn't – that you never heard me say that I was going to quit if I didn't get this, and now you're saying that I made it plain. How did I make it plain if I didn't tell you that ?
- A. You didn't say that you quit. You just said you wouldn't come back.
- Q. Okay.

Tr. 66-67. This testimony indicates that although Smith did not specifically state that he would quit his job if his written guarantees were not provided, Piehl concluded that Smith would not return to work unless the written terms were provided. Except for his attestations that he did not present an ultimatum, Smith has not presented an account of the July 31, 2001 conversation showing that Piehl's interpretation of his demands was pretext for discrimination. The ALJ specifically found credible Piehl's testimony that Smith stated he would not return to work unless his conditions were met. R. D. & O. at 29. We note that the ALJ also explicitly stated that he gave regard to the demeanor of the witnesses in making his credibility findings. R. D. & O. at 19. The ALJ concluded, based upon Piehl's testimony as well as a "synthesis of the most plausible versions of the July 31, 2001 meeting," that Smith presented terms to WST that constituted conditions for his return to employment.

Although the Board engages in a de novo review of cases under the CAA, an ALJ's demeanor-based credibility determinations are entitled to great weight. Moreover, Smith has not shown that the ALJ's determinations were erroneous. We therefore conclude that Smith has failed to prove by a preponderance of the evidence that WST violated the CAA by interpreting his remarks at the July 31, 2001 meeting as setting forth a condition precedent to his return and a refusal to resume work on the terms on which he had been employed.

E. Smith Has Not Shown That the ALJ Erred By Excluding the Nystel Affidavit As Hearsay

In his Petition for Review, Smith contends that the ALJ erred by excluding an affidavit from Nystel. WST argues that the ALJ properly excluded the affidavit under Rule 802 of the Federal Rules of Evidence, which provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." We note that the rules governing hearings under the employee protection provision of the CAA state that formal rules of evidence do not apply, but the ALJ is to apply "rules or principles designed to

assure production of the most probative evidence available,” and “may exclude evidence which is immaterial, irrelevant, or unduly repetitious.” 29 C.F.R. § 24.6(e).

Smith has not provided the Board with any rationale for reversing the ALJ’s ruling on this matter and we therefore affirm his exclusion of the affidavit.

CONCLUSION

We conclude that Smith engaged in protected activity when he complained about WST’s painting operations, and that WST violated the CAA by placing him in a “cooling off” period, albeit with pay. However, we find that Smith was paid his regular salary during the entire “cooling off” period and he has failed to present evidence establishing damages for this violation. We also conclude that Smith failed to prove by a preponderance of the evidence that WST terminated his employment in retaliation for protected activity. Therefore, Smith failed to sustain his burden of proof. Accordingly, his complaint is **DISMISSED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge